NO. 01-10036

Supreme Court, U.S.
FILED
JUN 11 2002
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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 2002

SAMUEL HALL

PETITIONER

VS.

UNITED STATES OF AMERICA

RESPONDENT

ORIGINAL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

SAMUEL HALL, PRO SE
UNIT F-1, #42217-004
FEDERAL CORRECTIONAL INSTITUTION
2680 HWY. 301 SOUTH
JESUP, GEORGIA 31599

79pp.

QUESTION PRESENTED

ISSUE ONE

WHETHER THE DISTRICT COURT ERRED IN CONSTRUING THE §2241 MOTION AS A MOTION PURSUANT TO TITLE 28 U.S.C. §2255, ULTIMATELY DISMISSING THE MOTION AS BARRED PURSUANT TO §2255 RULES.

ISSUE TWO

WHETHER PURSUANT TO BOUSLEY VS UNITED STATES THAT DEFINES ACTUAL INNOCENCE THE PETITIONER IS BEING IMPRISONED FOR CONDUCT THAT IS NOT PROHIBITED BY LAW?

ISSUE THREE

WHETHER THE PETITIONER WOULD BE FOUND INNOCENT OF ACTIVE EMPLOYMENT OF A FIREARM PURSUANT TO 18 U.S.C. §924(c) UNDER THE DFEINITION DEFINED BY THIS COURT IN BAILEY VS. UNITED STATES AND ITS PROGENY?

REPORTS OF OPINIONS BELOW

The Petitioner initially filed a Title 28 U.S.C. §2241 motion on April 2, 2001 to challenge his Count three conviction for violation of Title 18 U.S.C. §924(c) in the United States District Court for the Southern District of Georgia. Judge Anthony Aliamo transferred the petition to the Sentencing Court in the Southern District of Florida, Miami Division.

Magistrate Judge Charlene Sorrentino recommended on May 17, 2001 that the Petition be dismissed. The District Court by order dated June 13, 2001 dismissed the case for not having authorization from the Eleventh Circuit for a second successive 2255 motion. The Petitioner filed a motion for reconsideration. The District Court denied the reconsideration motion on August 14, 2001. The Petitioner filed a notice of appeal on September 6, 2001.

The Eleventh Circuit Court of appeals denied the certificate of appealability on January 16, 2002. The Petitioner filed for reconsideration hearing. The Eleventh Circuit denied the Motion for reconsideration on March 20, 2002.

No other pleadings have been filed in this case.

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STATEMENT OF JURISDICTION

The District Court exercised jurisdiction over this case pursuant to 28 U.S.C. §2255, which was in error, since the Petition was filed as a Title 28 U.S.C. §2241 motion. The Court of Appeals exercised jurisdiction pursuant to 28 U.S.C. §2253. This Court has jurisdiction pursuant to 28 U.S.C. §1254 and part III of the Rules of this Court. The decision of the Court of Appeals denying Petitioner's notice of appeal from a 2241 motion was entered on March 20, 2002. This petition is timely filed pursuant to Supreme Court rule 13.1.

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Southern District of Georgia, since the Petitioner is presently incarcerated at the Federal Correctional Institution at Jesup, Georgia. The case was transferred by the U.S. District Judge to the Southern District of Florida, Miami division and thus jurisdiciton was proper since the Petitioner was indicted by the Grand Jury from the Southern District of Florida for violating federal criminal laws. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742, which provide that the Court of Appeals shall have jurisdiction for all final decisions of the United States District Court. This petition is filed pursuant to Supreme Court rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments V and VI to the United States Constitution are involved and implicated in this Petition and both are set forth below. The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arsing in the land or naval forces, or in the Militia, when in actual service in time of War or Public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process, nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. V.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trail, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and casue of the accusation; to be confronted witht the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assitance of Counsel for his defense.

U.S. CONST. AMEND. VI.

STATEMENT OF THE CASE

PROCEDUAL HISTORY:

On April 25, 1991, a second superseding indictment was returned by the Federal Grand Jury for the Southern District of Florida. The Petitioner Samuel Hall was charged in Count one with conspiracy to possess with the intent to distribute cocaine, in violation of Title 21 U.S.C. §846; Count Two: possession with intent to distribute cocaine, in violation of Title 21 U.S.C. §841(a)(1) and Count Three use of a firearm in the commission of a drug offense, in violation of Title 18 U.S.C. §924(c).

The Petitioner has exhausted all appeal avenues, and all 2255 motions were denied by the Court. The Court originally imposed a term of imprisonment of 210 months on Count one and two of the indictment and on count three (3) [§924(c)] count, the court imposed a 60 month consecutive sentence.

The Petitioner was convicted of Count III and the Court imposed a 60 month consecutive sentence to the 210 months imposed on the drug counts. The Petitioner is actually innocent of active employment of a firearm in relation to or during a drug trafficking crime.

The Petitioner filed a 2241 motion to seek relief from the sixty month sentence and the Court construed the motion as second successive motion and denied the 2241 petition without considering the merits of the claims.

No other pleadings have been filed in this case.

REASONS FOR ALLOWANCE OF THE WRIT

ISSUE ONE

WHETHER THE DISTRICT COURT ERRED IN CONSTRUING THE §2241 MOTION AS A MOTION PURSUANT TO TITLE 28 U.S.C. §2255, ULTIMATELY DISMISSING THE MOTION AS BARRED PURSUANT TO §2255 RULES?

The district court deneid the instant petition that was filed as a Title 28 U.S.C. §2241 motion as being a successive §2255 motion. The Petitioner contends that he raised the Bailey claims pursuant to Title 28 U.S.C. §2241 because the §2255 remedy is inadequate and ineffective because he was unable to raise his claim in prior §2255 motions becasue the Bailey decision was not in existence at the time, and thus, he had no reasonable opportunity to obtain earlier jurdicial correction of the alleged active employment of a firearm. The Petitioner contends based upon the intervening Bailey decision that he can now show that he is actually innocent of the violation of Title 18 U.S.C. §924(c), active employment of a firearm, because he was never found guilty beyond a reasonable doubt on the charges as defined by this Court in Bailey.

The District Court did not address the merits of the §2241 motion except to state that the Petitioner is entitled to no relief pursuant to Bailey, concluding that the Petitioner did not have approval from the Eleventh Circuit Court of Appeals to file a second or successive 2255 motion. This conclusion cannot stand since the Court did not consider the claims raised in the

§2241 motion. The Court subsequently dismissed the petition.

A §2241 petition which attacks custody resulting from a federally imposed sentence may be entertained when the Petitioner establishes that the remedy provided for under §2255 is inadequate or ineffective to test the legality of his detention. **Tolliver**, 211 F. 3d 877 (5th Cir.). **Tolliver** states that the "Savings Clause" the fifth paragraph of §2255 provides that:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief of by motion pursuant to this section, sahll not be entertained if it appears that the applicant has failed to apply for relief, by motion to the court which sentenced him, or that such court has denied him relief unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. §2255.

The Circuit decisions support the Petitioner's contention that this §2241 writ is appropriate for the relief requested. See **Treistman**, 124 F. 3d at 365-366; **Dorsainvil**, 119 F. 3d at 246-48. In these cases the prisoners were unable to obtain review of their claims pursuant to §2255 motion because **Bailey** had been decided after they had filed their first §2255 motions, and they were unable to meet the requirements for filing a successive §2255 motion. See **Davenport**, 147 F. 3d at 607-08. **Triestman**, 124 F. 3d at 365-66; **Dorsainvil**, 119 F. 3d at 246-48.

The Petitioner conceds that the courts have narrowly recognized that the §2241 is the proper remedy for relief on newly recognized authorities. The Petitioner requests

this Court to conclude that the Circuit Split should be considered by this Court. The Petitioner requests this Court to adopt the recent decision of the Fifth Circuit in **Jeffers vs. Chandler**, 234 F. 3d 277 (5th Cir. 2000) and find that the Title 28 U.S.C. §2241 motion is the proper remedy to seek the relief requested pursuant to the Bailey decision. The Court in Jeffers concluded that the District Court should consider the merits of the jury charge claim. This decision is analogous since the Appellant has raised the same identical question to this Court based upon Bailey.

The Eleventh Circuit in **Wofford vs. Scott**, 177 F. 3d 1236, 1244 & n.3 (11th Cir. 1999) held that Petitioner's claims should be based on a retroactively applicable Supreme Court decision which overrules circuit law that was existing at the time the claim should ahve otherwise been raised. This reasoning plus the reasoning of **Triestman**, 124 F. 3d at 377-80 regarding a serious constitutional question supports the Petitioner's claims that the §2241 motion is the proper remedy for relief in this case.

The Petitioner raised claims of actual innocence pursuant to Bousley, and that the elements of active employment as defined by this Court had not been met in this case. Wherefore, based upon these facts, the Petitioner prays that this court will grant the Writ for Certiorari.

ISSUE TWO

WHETHER PURSUANT TO BOUSLEY VS. UNTIED STATES THAT DEFINES ACTUAL INNOCENCE THE PETITIONER IS BEING IMPRISONED FOR CONDUCT THAT IS NOT PROHIBITED BY LAW?

In denying the COA, based upon the 2241 being a successive 2255 motion without permission of the Eleventh Circuit, the PETITIONER was denied the opportunity for the Court to consider that he was actually innocent pursuant to **Bousley vs. United STATES**, 523 U.S. 614, 118 S. Ct. 1604, 1611, 140 L. Ed. 2d 828 (1998). The Supreme Court held in **Bousley**, that:

> WHere a defendant has procedurally defaulted a claim by failing to raise it on direct review the claim may be raised in habeas only if the defendant can first demonstrate either "cause and prejudice" **Murray vs. Carrier**, 397 U.S. 478, 485, 106 S. Ct. 2639, 2643-2644, 91 L. Ed. 2d 2497, 2506-2507, 53 L. Ed. 2d 597 (1977), or that he is "actually innocent", **Murray**, 477 U.S. at 496, 106 S. Ct. at 2649, 2650; **Smith vs. Murray**, 488 U.S. 527, 537, 106 S. Ct. 2661, 2667-2668, 91 L. Ed. 2d 434 (1986).
>
> .....
>
> Petitioner's claims may still be reviewed in this collaterial proceeding if he can establish that the Constitutional error in his plea colloquy "has presumely resulted in the conviction of one who is actually innocent." **Murray vs. Carrier**, 477 U.S. at 496, 106 S. Ct. at 2649.....

118 S. Ct. at 1611.

In **Bousley vs. United States**, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998), the Supreme Court held that the retroactivity anaylysis of Teague vs. Lane,, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), did not bar

petitioner's Bailey claim on collaterial review. [B]ecause Teague by its terms applies only to procedural rules, we think it is inapplicable to a situation in which this Court decides the meaning of a criminal statute enacted by Congress." **Bousley,** 523 U.S. at 620, 118 S. Ct. 1604.

Since **Bousley** makes the Bailey claim retroactive to the Petitioner, the Petitioner requests this court to issue the writ in order to permit the Petitioner to raise this actual innocent claim pursuant to the reasoning of the following Courts: **Jones**, 226 F. 3d at 333-34; **Davenport**, 147 F. 3d at 611-12; **Triestman**, 124 F. 3d at 380 ; **Hanserd**, 123 F. 3d at 930 and **Dorsainvil**, 119 F. 3d at 251. The application of Bailey defining active employment of a firearm , supports the fact that the Petitioner has been sentenced to a consecutive five year sentence for conduct that is not prohibited by law.

The decision in Bailey articulates the substantive elements that the government must prove to convict a person charged with with using a firearm under §924(c)(1). The Court in **U.S. vs. McPhil**, 113 F. 3d 197, 199 (5th Cir. 1997) concluded that the change is a substantive, non constiutional decision concerning the reach of a federal statute. In the case at bar, the jury could not have returned a guilty verdict in light of the Bailey decision. See also **United States vs. Williams**, 105 F. 3d 219, 221 (5th Cir. 1997).

Wherefore, a writ should issue in light of this Courts decision in Bousley.

ISSUE THREE

WHETHER THE PETTIONER WOULD BE FOUND INNOCENT OF ACTIVE EMPLOYMENT OF A FIREARM PURSUANT TO 18 U.S.C. §924(c) UNDER THE DEFINITION DEFINED BY THIS COURT IN BAILEY VS. UNITED STATES AND ITS PROGENY?

The basic facts regarding the firearm charge is that a codefendant (Bowers) was in the possession of a firearm, but these facts do not support the active employment of a firearm as set forth in **Bailey vs. United States**, 516 U.S. 137 (11th Cir. 1995). The plain language adopted by this Court is that there are three elements to a violation of the Title 18 U.S.C. §924(c) statute. There must be: 1) a firearm; 2). use of afirearm or carrying of a firearm; 3) a relationship between the firearm(s) usage and a violent crime or drug trafficking crime.

The Fifth Circuit in **U.S. vs. McPhail**, 112 F. 3d 197 (5th Cir. 1997) held that McPhail conviction could not be upheld based upon his coconspirators conviction for §924(c) when in fact the facts surrounding a firearm did not meet the definition adopted by this Court in **Bailey**, supra.

The actions of the PEtitioner clearly indicate that he was never in possession of a firearm, did not use a firearm, and did not carry a firearm in the offense that he has been charged with. During any of the transactions between the Petitioner and other(s) no drugs were present or no discussion of trafficking drugs occurred between the Petitioner and Fluker, Wilcox, Campbell, or Bowens when a firearm was carried or used by the Petitioner.

"In Bailey, this Court recognized for the time a defendant's right to be free of criminal liability under 924(c)(1) for conduct that had previously supported a conviction in virtually every circuit, thus recognizing a new right within the meaning of section 2255(3)"). **United States vs. Valdez**, 195 F. 3d 544, 547 (9th Cir. 1999) (Bailey constitutes a newly recongnized right under §2255(3); **United States vs. Lloyd**, 188 F. 3d 184, 187 (3rd Cir. 1999) (Bailey recognized for the first time that "use" under §924(c)(1) requires active employment of a firearm. See also **Pryor vs. U.S.**, 278 F. 3d 612 (6th Cir. 2002); **United States vs. Lopez**, 248 F. 3d 427 , 431 (5th Cir. 2001).

First mere possession of a firearm by a coconspirator does not constitute use "in relation to a drug trafficking crime." **Smith vs. United States**, 113 S. Ct. 2050, 2059 (1993). Second, the firearm must facilitate or potentially facilitate the drug trafficking offense. Id.

In **Bailey**, this court held, §924(c)(1) "requires evidence suffiicient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." (emphasis added) Id at 139.

The Petitioner requests this court to apply Bailey to this case and determine that a writ should issue based upon the following points:

First: no evidence was presented during the proffer of evidence to the jury that the Petitioner fired or attempted to fire the firearm, nor that he struck anyone with any of the guns alleged in the possession of his co-defendnat. So there is no record

of active employment.

Second, no evidence was presented during the proffer of evidence that any of the firearm(s) alleged in the indictment were used as an item of barter during the drug trafficking offense. So there also is no record evidence of active employment by that method.

Third, the trial testimony and the agents written reports of the alleged offense does not reflect that there is any record of "active employment" by any reference to a firearm "calcualted to bring about a change in the circumstances, as the offense relates to the actions of the Petitioner.

Fourth, there is no evidence to support "active employment" by brandishing becuse the trial testimony and agents reports do not support that the weapon in the indictment was brandished by the Petitioner.

Finally, in light of the progeny of cases and the split between circuits, regarding active emplyment, by displaying a firearm, the record evidence viewed in the light most favorable to the government shows, that the Petitioner was never in possession of a firearm, never used a firearm and never carried a firearm during this drug trafficking offense.

In this case, as supported by this Court's decision, the evidence was insufficient to show active employment by any of the menas discussed in **Bailey**, and therefore the "use" is not satisfied. The evidence is also insufficient to support that the Petitioner "carried" a firearm "during and in relation to

to a drug trafficking crime.

In this case, the Court in the jury instructions, instructed that the evidence need not prove the elements of "use", "carry" or during or in relation to a drug trafficking offense. The Court expressly instructed the jury with the term posession. The terms set forth by this court require proof of these elements beyond a reasoanble doubt.

Wherefore based upon the evidnce in this case and this Court's definition of active employment prusuant to Bailey, the Petitioner requests this Court to issue a writ in order to determine that the Petitioner is actually innocent of the §924(c) count.

CONCLUSION

The writ should be granted and the cause remanded to the Eleventh Circuit Court of Appeals for the Eleventh Circuit for further proceedings.

Respectfully Submitted,

Samuel Hall

Samuel Hall, Pro Se

RELIEF REQUESTED

WHEREFORE, the Petitioner moves this Court to issue a Writ of Certiorari in order to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted this 4th day of June, 2002.

Respectfully Submitted,

Samuel Hall

Samuel Hall, Pro Se
Unit F-1, #42217-004
2680 Hwy. 301 South
Federal Correctional Institution
Jesup, Georgia 31599

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 20 2002
THOMAS K. KAHN
CLERK

NO. 01-15265-I

SAMUEL HALL,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

Before **BLACK and MARCUS, Circuit Judges.**

BY THE COURT:

Appellant has filed a "Motion to request a Three Judge Panel to Review Motion for Certificate of Appealability and Petition for Suggestion of Rehearing En Banc," which is construed as a motion for reconsideration of this Court's order dated January 16, 2002, denying a certificate of appealability and denying as moot leave to proceed on appeal in forma pauperis. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED, because he has failed to make the requisite showing. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Appellant's motion for leave to proceed on appeal in forma pauperis is DENIED AS MOOT.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 16 2002
THOMAS K. KAHN
CLERK

N0. 01-15265-I

SAMUEL HALL,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

ORDER:

Appellant has filed a notice of appeal from the dismissal of his motion to vacate, set aside, or correct sentence, 28 U.S.C. § 2255, which is construed as a motion for a certificate of appealability. To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues he seeks to raise. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Because he already has filed three § 2255 motions to vacate and failed to seek leave from this Court prior to filing this current motion to vacate, appellant has failed to satisfy the second prong of Slack's test. The motion for a certificate of appealability is DENIED. Appellant's motion for leave to proceed on appeal in forma pauperis is DENIED AS MOOT.

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

FILED by ___ D.C.
JUN 12 2001
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - W.P.B.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-1877-CIV-RYSKAMP
(90-732-CR-MARCUS/RYSKAMP)
MAGISTRATE JUDGE SORRENTINO

REC'D by ___
JUN 13 2001
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - W.P.B.

SAMUEL HALL,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

CLERK U.S. DIST. CT.
S.D. OF FLA. - W.P.B.

ORDER OF DISMISSAL FOR FAILURE TO FILE AUTHORIZATION REQUIRED BY 28 U.S.C. §2244(b)(3)

CLOSED CASE

For the reasons stated in the Report of the Magistrate Judge and upon independent review of the file, it is

ORDERED AND ADJUDGED as follows:

1. This case is dismissed for failure of the movant to obtain from the Eleventh Circuit Court of Appeals the authorization required by 28 U.S.C. §2244(b)(3).

2. All motions not otherwise ruled upon are dismissed, as moot.

3. This case is closed.

DONE AND ORDERED at West Palm Beach, Florida, this 12 day of June, 2001.

Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE
Kenneth L. Ryskamp

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-1877-CIV-RYSKAMP
(90-732-CR-RYSKAMP/MARCUS)
MAGISTRATE JUDGE SORRENTINO

SAMUEL HALL, :

Movant, : REPORT RE DISMISSAL FOR FAILURE TO OBTAIN AUTHORIZATION PURSUANT TO 28 U.S.C. §2244(b)(3)

v. :

UNITED STATES OF AMERICA, :

Respondent. :

The movant filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2241 in the Southern District of Georgia, attacking criminal conviction 90-732-Cr-Marcus. Th. motion is in legal effect a successive motion to vacate pursuan to 28 U.S.C. §2255, and was therefore transferred to this Court.

On April 24, 1996, the habeas corpus statutes were amended. Included in the new amendments is a change in 28 U.S.C. §2244, which now reads as follows:

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior

application for a writ of habeas corpus except as provided in section 2255.

* * *

(b)(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

* * *

(Emphasis added.)

On the same day, April 24, 1996, 28 U.S.C. §2255 was amended in relevant part to provide the following:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be

> **sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or**
> **(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.**

The pro se movant filed three prior motions to vacate, attacking the same conviction, 90-732-Cr-Marcus. The first motion, Case No. 96-1811-Civ-Marcus, was denied on the merits, following a hearing on May 31, 1995. The appeal was denied on March 18, 1997, Case No. 95-4734. A second motion, filed while the first appeal was pending, was dismissed for lack of jurisdiction on July 31, 1996, Case No. 96-1676-Civ-Marcus. The third motion to vacate, Case No. 97-1798-Civ-Marcus was denied as successive on December 4, 1997. This fourth motion was filed in the Southern District of Georgia on May 2, 2001.

If the movant intends to pursue this case, he should forthwith apply to the United States Eleventh Circuit Court of Appeals for the authorization required by 28 U.S.C. §2244(b)(3)(A). The movant will be provided with a form to apply for such authorization with this report.

On its face, this successive motion is barred by the one year statute of limitations provided by 28 U.S.C. §2255. Under the circumstances of this case it does not appear that either a direct transfer of the case to the Court of Appeals pursuant to 28 U.S.C. §1631, or a stay of the present case would be appropriate. See generally Guenther v. Holt, 173 F.3d 1328 (11 Cir. 1999).

It is therefore recommended that this case be dismissed.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: May 17, 2001

UNITED STATES MAGISTRATE JUDGE

cc: Samuel Hall, Pro Se
Reg. No. 42217-004
FCI - Jesup
2600 Highway 301 South
Jesup, GA 31599

U.S. Attorney
Attn: Sharon Medeiros
99 N.E. 4th Street
Miami, FL 33132

NO. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

SAMUEL HALL

PETITIONER

VS.

UNITED STATES OF AMERICA

RESPONDENT

PROOF OF SERVICE

I, Samuel Hall, do swear or declare that on this date, 4th day, June, 2002, as required by Supreme Court Rule 29 (5) I have served the enclosed motion for leave to proceed in Forma Pauperis and Petition for A writ of Certiorari on each party to the above proceeding or that party's counsel and on every other person required to be served, by depositing an envelope containing the above documents in the United States Mail properly addressed to each of them and with first-class postage pre-paid.

The names and addresses of those served are as follows:

Assist. U.S. Attorney, S. District of Fl. 99 N.E. 4th St. Suite 412
Miami, Florida 33132
SOlicitor General of the United States, Rm. 5614, Department of
Justice, 950 Pennsylvania ave. N.E.
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 4th, , 2002.

Samuel Hall

Samuel Hall, Pro Se

CERTIFICATE OF SERVICE

I, Samuel Hall hereby certify that a true and correct copy of the foregoing motion for leave to proceed in forma pauperis on Writ of Certiorari has been properly addressed, with adequate postage affixed and deposited in the U.S. Mail to the following individuals:

Assist. U.S. Attorney
U.S. Attorney's Office
99 N.E. 4th Street
Miami, Florida 33132

And

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave. N.E.
Washington, D.C. 20530

Which is deemed filed at the time it is delivered to prison officials for forwarding. **Houston vs. Lack**, 101 L. Ed. 2d 345 (1988) and deposited in the U.S. Mail on June 4, 2002 at Jesup FCI, Jesup, Georgia 31599

Respectfully Submitted,

Samuel Hall

Samuel Hall, Pro Se
Unit F-1, #42217-004
Federal Correctional Institution
2680 Hwy. 301 South
Jesup, Georgia 31599

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

CERTIFICATE OF SERVICE

I, Samuel Hall hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been deposited in the U.S. Mail with adequate postage to the following on this 4th day of June, 2002:

Assist. U.S. Attorney
U.S. Attorney's Office
99 N.E. 4th Street, Suite 412
Miami, Florida 33132

And

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave. N.E.
Washington, D.C. 20530

And

Clerk of the Court
Mr. William K. Suter, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Which is deeded filed at the time it is delivered to prison officials for depositing. **Houston vs. Lack**, 101 L. Ed. 2d 245 (1988) and deposited in the U.S. Mail with adequate postage at Jesup Correctional Institution, Jesup, Georgia 31599

Samuel Hall

Samuel Hall, Pro Se
Unit F-1, #42217-004
Federal Correctional Institution
2680 Hwy. 301 South
Jesup, Georgia 31599

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Samuel Hall (42217-004)
Federal Correctional Institution
2680 Highway 301 South
Jesup GA 31599

March 20, 2002

RE: 01-15265-I Samuel Hall v. USA
DC DKT NO.: 01-01877 CV-KLR

TO: Samuel Hall (42217-004)

CC: Anne R. Schultz

CC: Clarence Maddox

CC: Hon. Kenneth L. Ryskamp

CC: Administrative File

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

March 20, 2002

Samuel Hall (42217-004)
Federal Correctional Institution
2680 Highway 301 South
Jesup GA 31599

RE: 01-15265-I Samuel Hall v. USA
DC DKT NO.: 01-01877 CV-KLR

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

NO FURTHER ACTION WILL BE TAKEN.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Pamela Allen (404) 335-6188

MOT-2 (2-2002)

Samuel Hall (42217-004)
Federal Correctional Institution
2680 Highway 301 South
Jesup GA 31599

January 16, 2002

RE: 01-15265-I Samuel Hall v. USA
DC DKT NO.: 01-01877 CV-KLR

TO: Clarence Maddox

CC: Samuel Hall (42217-004)

CC: Anne R. Schultz

CC: Hon. Kenneth L. Ryskamp

CC: Administrative File

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

January 16, 2002

Clarence Maddox
Clerk, U.S. District Court
701 Clematis St., Room 402
West Palm Beach FL 33401

RE: 01-15265-I Samuel Hall v. USA
DC DKT NO.: 01-01877 CV-KLR
SECONDARY CASE NO: 90-00732-CR-KLR

The enclosed certified copy of this Court's order denying the application for a Certificate of Appealability is issued in lieu of the mandate of this court. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Also enclosed is the record on appeal, which consists of:
3 Boxes: 1 volume of pleadings
7 volumes of transcripts
7 Expandables and 1 PSI

Please acknowledge receipt by returning the enclosed copy of this letter.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Pamela Allen (404) 335-6188

Encl.

DIS-4 (1-1999)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 01-15265-1

SAMUEL HALL

APPELLANT.PETITIONER

VS.

UNITED STATES OF AMERICA

APPELLEE/RESPONDENT

MOTION TO REQUEST A THREE JUDGE PANEL TO REVIEW
MOTION FOR CERTIFICATE OF APPEALABILITY
AND PETITION FOR SUGGESTION OF REHEARING EN BANC

Comes now the Appellant Petitioner, Samuel Hall pro se to request this Court to allow a three judge panel to review the decision of this court in denying the certificate of appealability in the case at bar. The Certificate of Appealability has been denyd by United States Circuit Judge Honorable Susan Black without any logical explaination regarding the merits of the claims raised in the Title 28 U.S.C. §2241 Motion.

This Honorable Court issued an order denying the certificate of appealability without any reason except to state that the Appelalnt had failed to make a substantial showing of a

Constitutional rights. The Appellant's claims were raised pursuant to a Title 28 U.S.C. §2241 motion because this Court had denied the application for a second successive 2255 motion. The claim raised is supported by the facts of this case, in that the "use" and "carry" prong of Title 28 U.S.C. §924(c) has not been meet in the case at bar as set forth in **Bailey vs. United States**, 516 U.S. 137 (1995) and **Bousley vs. United States**, 523 U.S. 614, 118 S. Ct. 1604, 1611, 140 L. Ed. 2d 828 (1998).

The Appellant requests that this Court consisting of a three judge panel or the entire panel to address the applicability of the Antiterrorism and Effective Death Penalty act of 1996 (AEDPA, Pub. Law No. 104-132, 110 Stat. 1214, to this case. The AEDPA made a number of procedural and substantive changes to the habeas corpus provisions in Chapter 153 of Title 28 of the United States Code, AEDPA §§101-106 (codified U.S.C. §§2254-2353 2255).

Section 102 of the Amended 28 U.S.C. §2253 to inquire that a petitioner obtain a certificate of appealability from a circuit judge. Rule 22(b) or appellate procedure allows eitehr a district judge or a circuit judge to issue a COA. The COA is grnated only if the appellant has made a substantial showing of a Constitutional right." **Drinkard vs. Johnson**, 97 F. 3d 751 (5th Cir. 1996). If the District judge has denied the certificate of appeal-ability, the applicant for the writ may then request issuance of the certificate of appealability by the Circuit Judges. The Eleventh Circuit fuling in **Hunter vs. U.S.**, 101 F. 3d 1565, 1575 ,

(11th Cir. 1996) holds that if no express request for a certificate of appealability is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the Court of appeals. The implied intentions of the Eleventh Circuit is that the Certificate of Appealability and the record in the case will be reviewed by a panel of judges. The Appellant requests this action in the case at bar.

This case was filed pursuant to 28 U.S.C. §2241 attacking the illegal sentence imposed pursuan to 18 U.S.C. §924(c) and thus is a proper petition which attacks the custody, since the remedy provided under §2255 is inadequate or ineffective to test the legality of the Appellant's detention. **Tolliver**, 211 F. 3d 877 (5th Cir.). Tolliver states that the "Savings Clause" the fifth paragraph of §2255 provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuan tto this section, shall not be entertained if it appears tha that the Applicant has failed to apply for relief, by motion to the to the Court that has sentenced him, or that such court has denied him relief, unless it appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. §2255.

The Circuit's decisions support the Appellant's contention that this §2241 writ is appropriate for the relief requested. See **Triestman**, 124 F. 3d at 365-366; **Dorsainvil**, 119 F. 3d at 246-48. In each of these cases the prisoners were unable to obtain review of thier claims pursuan to §2255 because **Bailey** was decided after they had filed their first 2255 motions, and they were

procedually barred, and not able to meet the requirements for filing a successive §2255 motion. See Davenport, 147 F. 3d at 607-608. Triestman, 124 F. 3d at 365-66; Dorainvil, 119 F. 3d at 246-248.

The Appellant requests this Court to adopt the decision of the Fifth Circuit in Jeffers vs. Chandler, 234 F. 3d 277 (5th Cir. 2000) and find that the Title 28 U.S.C. §2241 is the proper remedy to seek the relief requested pursuant to the Apprendi decision. The Court in Jeffers concluded that the District Couirt should consider the merits of the jury charge claim. This decision is analogous to the Appellant case because the Appellant has raised the identical question to the Court based upon Bailey.

This Court's decision in Wofford vs. Scott, 177 F. 3d 1236, 1244 & n.3 (11th Cir. 1999) held that Petitioner's claims should be based on a retroactively applicable Supreme Court decision which overrules circuit law that was existing at the time the claim should have otherwise been raised. This reasoning plus the reasoning of Triestman, 124 F. 3d at 377-80 regarding the serious Constitutional question supports the Appellant's claim that the §2241 motion is the proper remedy for relief in this case.

This Court msut agree with this logic and agree that fundamental fairness and accuracy of a criminal conviction would be in question, where as here, the defendant's sentence has been based on facts which does not support the new ruling in Bailey which was decided after the sentence was impoed by the District Court...

CONCLUSION

Wherefore Appellant request a review by this Court of the facts as related to the Bailey claims and conclude that a certificate of appealability is not required and allow the Appellant to proceed on appeal since no certificate of appealability is required for a §2241 motion. The Appellant prays that this Honorable Court will grant a rehearing and ultimately allow this appeal to proceed.

Respectfully Submitted,

Samuel Hall, Pro Se
Unit F-2, #4227-004
2680 Hwy. 301 South
Federal Correctional Institution
Jesup, Georgia 31599

CERTIFICATE OF SERVICE

I, Samuel Hall hereby certify that a true and correct copy of the foregoing Appellant's request for reconsideration by a three judge panel or suggestion for en banc hearing has been deposited in the U.S. Mail with adequate postage on this 8th day of February, 2002 to the following;

Ms. Anne Schultz
Chief, Appellate Division
99 N.E. 4th Street, Suite 412
Miami, Florida 33132

And

Clerk of the Court
U.S. Court of Appeals
Eleventh Circuit
56 Forsyth St. N.W.
Atlanta, Ga. 30303

Samuel Hall, Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 01-1877-Civ-Ryskamp/Sorrentino

SAMUEL HALL,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

FILED by _____ D.C.
OCT - 4 2001
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - W.P.B.

ORDER DENYING AS MOOT MOTION TO PROCEED IN FORMA PAUPERIS

This Cause came before the Court upon Movant's Application to Proceed In Forma Pauperis **[DE 12]**. Considering that on September 24, 2001, this Court denied the certificate of appealability **[DE 11]**, the Court concludes that Movant is not entitled to proceed in forma pauperis. Therefore, having considered the motion and the pertinent portions of the record, it is

ORDERED AND ADJUDGED that the Motion to Proceed In Forma Pauperis **[DE 12]** is DENIED AS MOOT.

DONE AND ORDERED at the United States District Court, West Palm Beach, Florida, this 4 day of October, 2001.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:
Samuel Hall, *pro se*, Reg. No. 42217-004, FCI - Jesup, 2600 Highway 301, South Jesup, GA, 31599
Sharon Medeiros, U.S. Attorney

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SAMUEL HALL

PEITITIONER,

VS.

UNITED STATE OF AMERICA

RESPONDENT.

CASE NO. 01-1877-CIV-RYSKAMP
90-732-CR-RYSKAMP/MARCUS

PETITIONER'S OBJECTIONS TO THE
MAGISTRATE'S REPORT AND RECOMMENDATION

Comes now, Samuel Hall, the Petitioner in this action, and pursuant to applicable rules and laws, respectfully submits the foregoing objections to the Magistrate Judge's Report and Recommendation (R & R) requesting dismissal of this Title 28 U.S.C. §2241 Motion, as well as the conclusions of law therein.

1). Petitioner adopts the statement of the case set forth therein the initial pleadings.

2). Objections as to the R & R are made as to the conclusions of Magistrate Sorrentino conclusion that the Petitioner should seek permission from the Eleventh Circuit Court of Appeals for a second successive motion.

PETITIONER'S OBJECTIONS AND POINTS OF

AUTHORITIES IN SUPPORT THEREOF

The R & R discusses the April 24, 1996 habeas corpus statutes as amended, and directs the court that this 2241 motion should be dismissed because the Petitioner did not seek permission pursuant to 28 U.S.C. §2244 for permission to file a second 2255 motion.

The Petitioner contends that he raised the **Bailey** claims pursuant to Title 28 U.S.C. §2241 because the §2255 remedy is inadequate and ineffective because he was unable to raise his claim in prior 2255 motions because the **Bailey** decision was not inexistence at the time, and thus, he had no reasoanble opportunity to obtain earilier juridical correction of the alleged defect in Count Three of the indictment, and subsequent conviction. The Appellaant contends because of the intervening **Bailey** decision that he can now show that he is actually innocent of the firearm charges in relation to a drug offense in violation of Title 18 U.S.C. §924(c). The **Bailey** decision sets forth the elements of the 924(c) statute, and these elements were not proved beyond a reasonable doubt, based upon the elements of that was listed in the indictment.

The District Court should address the merits of the 2241 motion and determine that the Petitioner is entitled to relief pursuant to **Bailey**, concluding that the Petitioner was sentenced to a consecutive five year sentence. The conclusion of the Magistrate judge is misplaced in requeting this Court to dismiss this action without the Court making an analyis of the issues based upon the merits of the elements involved in the 924(c) statute.

A §2241 ptitoin which attacks custody resulting from a federally imposed sentence may be entertained when the Petitioner establishes that the remedy provided for under §2255 is inadequate or ineffective to test the legality of his detention. **Tolliver**, 211 F. 3d 877 (5th Cir.). **Tolliver** states that the "Savings Clause" the fifth paragraph of §2255 provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion to the court which sentenced him, or that such court has denied him relief, unless it also appears tha the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. §2255.

The Circuit decisions support the Petitioner's contention that this §2241 writ is appropriate for the relief requested. See **Triestman**, 124 F. 3d at 365-366; **Dorsainvil**, 119 F. 3d at 246-48. In these cases the prisoners were unable to obtain review of their claims pursuant to §2255 motion because **Bailey** has been decided after they had filed their first §2255 motions, and they were unable to meet the requirments for filing a successive §2255 motion. See **Davenport**, 147 F. 3d at 607-08. **Triestman**, 124 F. 3d at 365-66; **Dorainvil**, 119 F. 3d at 246-48.

The Petitioner concedes that the courts have narrowly recognized that the §2241 is the proper remedy for relief on newly recognized authorities. The Petitioner requests this Court to conclude and adopt the decision of the Fifth Circuit in **Jeffers vs. Chandler**, 234 F. 3d 277 (5th Cir. 2000) and find that the Title 28 U.S.C.

§2241 motion is the proper remedy to seek the relief requested pursuant to the **Apprendi** decision. The Court in **Jeffers** concluded that the District Court should consider the merits of the jury charge claim. This decision is analogous since the Petitioner has raised the same identical question to the court based upon **Bailey**.

The Eleventh Circuit in **Wofford vs. Scott**, 177 F. 3d 1236, 1244 & n.3 (11th Cir. 1999) held that petitioner's claims should be based on a retroactively applicable Supreme Court decision which overrules circuit law that was existing at the time the claim should have otherwise been raised. This reasoning plus the reasoning of **Triestman**, 124 F. 3d at 377-80 regarding a serious constitutional question supports the Petitioner's claim that the §2241 is the proper remedy for relief in this case.

The Petitioner raised issues regarding the elements of the §924(c) count, and that these elements were not placed before the jury for a finding of guilty beyond a reasonable doubt.

Wherefore based upon the recent holdings of the Circuit Courts, the Appellant requests this Court to consider this 2241 based on the merits, and reject the concept of the Magistrate judge report and recommendation.

Respectfully Submitted,

Samuel Hall, Pro Se
Unit F-1, #42217-004
2680 Hwy. 301 South
Federal Correctional Institution
Jesup, Ga. 31599

CERTIFICATE OF SERVICE

I, Samuel Hall hereby certify that a true and correct copy of the foregoing objections to the Magistrate report and recommendation has been deposited in the U.S. Mail with adequate postage on this 31st day of May, 2001 to the following:

Assist. U.S. Attorney
United States Attorney's Office
99 N.E. Fourth Street
Miami, Florida 33132

Samuel Hall, Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 01-1977-CIV-RYSKAMP/SORRENTINO

SAMUEL HALL,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

FILED by ____ D.C.
AUG 14 2001
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - W.P.B.

ORDER DENYING MOVANT'S MOTION TO REQUEST THIS COURT TO RECONSIDER THE ORDER DENYING THE 2241 MOTION AND CONSIDER THE MERITS OF THE 2241 MOTION

THIS CAUSE came before the Court upon Movant's Motion to Request this Court to Reconsider the Order Denying the § 2241 Motion and Consider the Merits of the § 2241 Motion. **[DE 8]** The Court dismissed his successive § 2255 motion due to his failure to obtain the authorization from the Court of Appeals for the Eleventh Circuit required by 28 U.S.C. § 2244(b)(3). Movant moves for reconsideration, stating that he did file a request for authorization, which was denied by the Eleventh Circuit on January 20, 1998.

Section 2244(b)(3) states that

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
> . . .
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

28 U.S.C. § 2244(b)(3).

9

A movant seeking to file a successive motion to vacate is therefore required to *obtain* authorization from the Eleventh Circuit. The Eleventh Circuit has denied Movant Samuel Hall's request for authorization. Therefore, the motion for reconsideration should be denied, because this Court cannot hear Movant's successive motion to vacate.

THE COURT having considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that Movant's motion for reconsideration is DENIED.

[DE 8]

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 14 day of August 2001.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:
Samuel Hall, Pro Se, Reg. No. #42217-004, FCI - Jesup, 2600 Highway 301 South, Jesup, GA 31599 (by mail)
U.S. Attorney, attn: Sharon Medeiros

FILING FEE
Clerence Maddox, Clerk

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FILED BY _____ D.C.
01 SEP -5 AM 11:27
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIA

REC'D by _____ D.C.
SEP - 6 2001
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - W.P.B.

SAMUEL HALL

PETITIONER,

VS.

UNITED STATES OF AMERICA

RESPONDENT.

CASE NO. 01-1877-CIV-RYSKAMP
90-732-CR-RYSKAMP/
MARCUS

NOTICE OF APPEAL

Comes now the Petitioner, Samuel Hall, to file Notice of Appeal to the Eleventh Circuit Court of Appeals from the denial order of this Court denying the Title 28 U.S.C. §2241 Motion and Motion for reconsideration.

Dated this 28th Day of August, 2001.

Respectfully Submitted,

Samuel Hall

Samuel Hall, Pro Se
Unit F-1, #42217-004
2680 Hwy. 301 South
Federal Correctional Institution
Jesup, Georgia 31599

DATED: AUGUST 29th, 2001

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

Samuel Hall
Federal Correctional Institution
42217-004
2680 Highway 301 South
Jesup, GA 31599

1:01-cv-01877 #7
2 page(s).
06/13/2001

Control #: CV-fax_40D-15100

cc: Samuel Hall, Pro Se (by mail)
U.S. Attorney, Attn: Sharon Medeiros (by mail)

In the United States District Court
Southern District of Georgia
Brunswick Division

Samuel Hall
Unit F-1, #42217-004 Petitioner,
2680 Hwy. 301 South
Federal Correctional Institution
Jesup, Ga. 31599

(Address or place of confinement and prison number. Full name which you were convicted under).

Civil Case NO. _____
Underlying Criminal No.
90-732-CR-MARCUS(S)

vs.

D. L. Hobbs, Warden
Jesup Federal Correctional Institution Respondant,
2680 Hwy. 301 South
Jesup, Georgia 31599

(Name of Warden or other authorized person having custody of petitioner)

PLEASE COMPLETE THE FOLLOWING: (check appropriate number)

This petition concerns:

1. a. XXXX a conviction.
   b. XXXX a sentence.
   c. _____ jail or prison conditions.
   d. _____ prison discipline.
   e. _____ a parole problem.
   F. _____ other.

2. Place of detention Federal Correctional Institution, Jesup, Ga. 31599

3. Name and location of court which imposed sentence United States District Court, Southern District of Florida

4. The indictment number or numbers (if known) upon which, and the offense or offenses for which, sentence was imposed:

(a) 90-732-CR-Marcus(s) Count one, Conspiracy to distibute cocaine

(b) Count Two - Possession with instent to distribute cocaine

(c) Count Three - Use of a firearm in violation of 18 U.S.C.§924(c)

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 210 months on Count one and two 12-3-1991

(b) 60 months consecutive - Count Three 12-3-1991

(c)

6. Check whether a finding of guilty was made:

(a) After a plea of guilty

(b) After a plea of not guilty XXX

(c) After a plea of nolo contendere

7. If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) a jury XXX

(b) a judge without a jury

8. Did you appeal from the judgment of conviction or the imposition of sentence?

(XXX) Yes ( ) No

9. If you did appeal, give the following information for each appeal:

a. (1) Name of court Eleventh Circuit Court of Appeal

(2) Result District Court decision affirmed

9. a. Continued

(3) Date of result N/A

(4) Citation or number of opinion N/A

(5) Grounds raised (list each) N/A

(a) _____

(b) _____

(c) _____

(d) _____

b. (1) Name of court N/A

(2) Result _____

(3) Date of result _____

(4) Citation or number of opinion _____

(5) Grounds raised (list each)

(a) _____

(b) _____

(c) _____

(d) _____

Caution: If you are attacking a sentence imposed under a federal judgment, you must first file a direct appeal or motion under 28 U.S.C. §2255 in the federal court which entered the judgment.

10. State CONCISELY every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, attach a SINGLE page only behind this page.

CAUTION: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

10. Continued

a. Ground One Pursuant to Bousley vs. United States, the Petitioner's claims may be considered on the merits in this proceeding if he can demonstrate that he is innocent of using a firearm in the commission of a drug trafficking crime in violation of 18 U.S.C. §924(c). Supporting FACTS (Tell your story BRIEFLY without citing cases or law).

CAUTION: You must state facts not conclusions in support of your grounds. A rule of thumb to follow is - who did exactly what to violate your rights at what time or place.

See Memorandum of law and facts. The Petitioner is innocent of the charge in violation of Title 18 U.S.C. §924(c).

b. Ground Two Whether there was sufficient evidence to support a finding of guilty by the jury based upon the actions of the Petitioner for using a firearm during and in relation to a drug trafficking crime in violation of Title 18 U.S.C. §924(c)? Supporting FACTS (Tell your story BRIEFLY without citing cases or law).

See Memorandum of law and facts. The Petitioner was not in possession of a firearm as alleged in count three.

10. Continued

Ground Three Whether the Petitioner due process rights were violated when the courts instructions to the jury removed the elements of use, carry, and during or in relation to a drug trafficking offense in violaton of 18 U.S.C. §924(c) for consideration contrary to Bailey Supporting FACTS (tell your story briefly without citing cases or law).

and U.S. vs. Gaudin.

[See Memorandum of Law and facts].

d. Ground Four Title 28 U.S.C. §2241 is the proper remedy to entertained the due process violation in count three of this case.

Supporting FACTS (tell your story BRIEFLY without citing cases or law)

[See Memorandum of law and facts]

11. Have you filed previous petitions for habeas corpus, motions under section 2255 of Title 28, United States Code, or any other applications, petitions or motions with respect to this conviction?

Yes (XXX No ( )

12. If your answer to question number 10 was "yes", give the following information:

a. (1) Name of Court U.S. District Court S. District of Florida

(2) Nature of proceeding 2255 motion

(3) Grounds raised Ineffective assistance of counsel

(4) Result Motion denied

(5) Date of result

(6) Citation or number of any written opinion or order entered pursuant to each disposition.

N/Available

b. (1) Name of Court U.S. District Court S. District of Florida

(2) Nature of proceeding 2nd 2255 Motion

(3) Grounds raised Ineffective assistance of counsel

(4) Result motion denied

(5) Date of result 1997

(6) Citation or number of any written opinions or orders entered pursuant to each such disposition.

N/available

13. If you did not file a motion under Section 2255 of Title 28, United States Code, or if you filed such a motion and it was denied, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention:

The Bailey decision was decided after all of the habeas actions were filed in this case.

14. Are you presently represented by counsel? Yes ( ) No XXX

If so, name, address and telephone number _____

Case name and Court _____

15. If you are seeking to proceed in forma pauperis, have you completed the declaration setting forth the reqired information? Yes ( ) No (XXX)

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Signed this 2nd day of April, 19 2001

_____

(Signature of Petitioner)
Samuel Hall, Pro Se

DECLARATION

I, Samuel Hall declare under penalty of perjury that I have read and subscribe to the above and state that the information contained therein is true and correct to the best of my knowledge.

Executed 4-2-01 (Date) at Jesup Correctional Federal Institution (Place)

(Signature of Petitioner)
Samuel Hall, Pro Se

(Signature of Attorney)(If any)

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

SAMUEL HALL

PETITIONER,

VS.

D.L. HOBBS, WARDEN,
UNITED STATES OF AMERICA

RESPONDENT.

CIVIL CASE NO. _____
UNDERLYING CASE NO.
90-732-CR-MARCUS(S)

MEMORANDUM OF LAW IN SUPPORT OF A PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2241(d)

Comes now the Petitioner Samuel Hall and certifies that he is the moving party and seeks relief pursuant to 28 U.S.C. §2241(d) from Respondent's continued execution of an illegal sentence of imprisonment over him, that (1) the conviction upon which the sentence is derived, is (2) based upon the rot of an defective indictment and (3) missing elements from the charged indictment, that the actual facts of the case does not support a finding of guilty for count three of the indictment, contrary to [t]he recent decision of UNITED STATES VS. BAILEY, 516 U.S. 137 (1995).

The Petitioner asserts the following in support of his application for writ of habeas corpus and therefore, states that his imprisonment is unconstitutional on count three and that the Respondent is executing an illegal prison term against him.

QUESTION PRESENTED:

Whether Petitioner's custody is unlawful, because the District Court violated his Sixth Amendment right to be informed of the nature and cause of the alleged offense and Petitioner's unfounded actual punishment by the Court's lack of persona and subject matter jurisdiction relevant to incomplete statute pursuant to 18 U.S.C. §924(c), which omitted information that exposed him to punishment with which the jury must determine beyond a reasonable doubt, in violation of the due process clause of the Fifth and Fourteenth Amendment to the United States Constitution.

VENUE:

The Supreme Court interpreted the language of 28 U.S.C. §2241(a)(d), which provides that writs of habeas corpus may be granted by district courts "within their respective jurisdictions. **Ahrens vs. Clark**, 335 U.S. 188, 68 S. Ct. 1443, 92 L. Ed. 1898. Since **Ahrens**, through the Fourth Circuit has held in **Word vs. North Carolina**, 406 F. 2d 352 (4th Cir. 1969) that **Ahrens**, is no longer viable, and that in appropriate circumstances a district court may entertain a habeas corpus petition in the sentencing juridiction even if [t]he petitioner is not confined or detained there."

HARMFUL COLLATERAL CONSEQUENCES:

"In order to have standing to attack such conviction Petitioner must show that he is presently suffering from "harmful collateral consequences" of challenged conviction. The Petitioner

is barred by the Eleventh Circuit Court of Appeals "at least it has been the rule of thumb," by the Eleventh Circuit to bar usage of the 28 U.S.C. §2255 vehicle in light of [t]he ruling handed down in **Bailey**, supra. The Petitioner concedes that the ....§2255 remedy may be inadequate to address the Constitutional mandate offered by the **Bailey** decision. A conviction [b]ased on a defective indictment, which did not list all of the elements of the statute, can only be constitutionally challenged by an application for a writ of habeas corpus pursuant to 28 U.S.C. §2241(a)(d); especially where "plain error" is also clear and apparent, as presented in the instant case.

AUTHORITY AND JURISDICTION:

The Petitioner was indicted by a Federal Grand Jury and a judgment of guilty was returned by the jury against him, and the Court imposed a sentence and referred the Petitioner to the custody and control of the United States Attorney General, who delegated such custody and control to the Federal Bureau of Prisons, for the execution of the sentence judgment "term of imprisonment".

At the time of the submission of this Petition for writ of Habeas corpus, pursuant to 28 U.S.C. §2241(d), petitioner is being housed under the custody and control of the respondent at the federal Correctional Institution, Jesup, Georgia, "2680 Hwy. 301 South".

"Where an application for a writ of habeas Corpus is made by a person in custody under judgment [a]nd sentence which contains two or more federal judicial districts, the application may be

filed in the [d]istrict court for the district wherein such person is in custody."

"The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

The application must address the custody in violation of the Constitution of the United States.

PROCEDURAL HISTORY

On April 25, 1991, a second superseding indictment was returned by the Federal Grand Jury for the Southern District of Florida. The Petitioner, Samuel Hall was charged in Count one with conspiracy to possess with the intent to distribute cocaine, in violation of Title 21 U.S.C. §846; Count Two; possession with intent to distribute cocaine, in violation of Title 21 U.S.C. §841(a)(1) and Count Three use of a firearm in the commission of a drug offense, in violation of Title 18 U.S.C. §924(c).

The Petitioner has exhausted all appeal avenues, and subsequently filed a 2255 motion, a second successive 2255 motion which was denied by the District Court. The Petitioner appeal the decision of the District Court in Case Number 97-0018 and 98-1001, but the decision of the District Court was affirmed by the Eleventh Circuit Court of Appeals. The Court originally imposed a term of imprisonment of 210 months on Count one and two and on count three [§924c] count, the court imposed a 60 month consecutive sentence.

No other pleadings have been filed in the case at bar.

The Petitioner is currently incarcerated at the Federal Correctional Institution at Jesup, Georgia.

ISSUE ONE

PURSUANT TO BOUSLEY VS. UNITED STATES, PETITIONER'S CLAIMS MAY BE CONSIDERED ON THE MERITS IN THIS PROCEEDING IF HE CAN DEMONSTRATE THAT HE IS INNOCENT OF USING A FIREARM IN THE COMMISSION OF A DRUG TRAFFICKING CRIME IN VIOLATION OF 18 U.S.C. §924(c).

The Petitioner elected to go to trial, and a jury verdict of guilty was returned against the Petitioner in Count Three, charging him with Use of a firearm in the commission of a drug crime. Limited instructions were given to the jury for a finding of the elements of Title 18 U.S.C. §924(c). The decision of the Supreme Court in **United States vs. Bailey**, 516 U.S. 137 (1995) were decided after the Petitioner's initial appeal pleadings had been filed. This action does not bar the consideration of the merits of the Petitioner's claims in this proceeding. In **Bousley vs. United States**, 523 U.S. 614, 118 S. Ct. 1604, 1611, 140 L. Ed. 2d 828 (1998), the Supreme Court held:

> Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either "cause" and actual "prejudice" **Murray vs. Carrier**, 477 U.S. 478, 485, 106 S. Ct. 2639, 2643-2544, 91 L. Ed. 2d 397 (1986); **Wainwright vs. Sykes**, 433 U.S. 72, 87, 97 S. Ct. 2497, 2506, 2507, 53 L. Ed. 2d 597 (1977), or that he is "actually innocent," **Murray**, 477 U.S. at 496, 106 S. Ct. at 2649, 2650; **Smith vs. Murray**, 488 U.S. 527, 537, 106 S. Ct. 2661, 2667-2668, 91 L. Ed. 2d 434 (1986).
>
> ....
>
> Petitioner's claim may still be reviewed in this collateral proceeding if he can establish that the constitutional error in his plea colloquy "has presumely resulted in the conviction of one who is actually innocent." **Murray vs. Carrier**, 477 U.S. at 496, 106 S. Ct. at 2649....

118 S. Ct. at 1611.

The Eleventh Circuit court of appeals recently applied **Bousley** to a similar case, **Jones vs. United States**, 153 F. 3d 1305 (11th Cir. 1998), where the defendant also moved to vacate his conviction in a §2255 proceeding based on **Bailey vs. United States**, 516 U.S. 137 (1995). The Eleventh Circuit held that although the defendant did not challenge his convictions, including his firearm conviction, on direct appeal, he "may still be able to avoid the procedural bar if he can show that the alleged error "has probably resulted in the convictions of one who is actually innocent.'" 153 F. 3d at 1308, citing **Bousley**, 118 S. Ct. at 1611.

Thus in this case, although the defendant did not challenge the sufficiency of the evidence to support a finding of guilty by the jury to the §924(c) count, the merits of his challenge to his conviction through a §2241 motion may be reviewed in this collateral proceeding if he can show that he is actually inncoent of the offense.

ISSUE TWO

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILTY BY THE JURY BASED UPON THE ACTIONS OF THE PETITIONER FOR USING A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME IN VIOLATION OF TITLE 18 U.S.C. §924(C).

The Petitioner was indicted in count three of the indictment for violation of Title 18 U.S.C. §924(c). The Petitioner was found guilty by jury of count three. The Petitioner contends that the government failed to proved sufficient evidence that the Petitioner use or carried a firearm during and in relation to any crime of violence or drug trafficking crime." (18 U.S.C. §924(c). Petitioner's argument will examine the requirements of 18 U.S.C. §924(c) (hereinafter "the statute" or §924(c) and apply these requirments to the particular facts of this case. The appropriate standard of review for this case is the "rational trier of fact" standard set forth by the Courts. 1/

I. **FIREARMS USED IN RELATION TO DRUG TRAFFICKING: THE NECESSARY NEXUS BETWEEN DRUGS AND FIREARMS:**

Initially, the Petitioner notes that a reading of the plain language indicates that there are three elements to a violation of the statute. There must be:

1/ We review claims of insufficent evidence to suport a jury finding of guilty under the standard of 'whether', after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **United States vs. Clemis**, 11 F. 3d 597, 601 (6th Cir. 1993). Cert denied, 114 S. Ct. 1858 (1994).

1). A firearm

2). use of a firearm or carrying of a firearm

3). a relationship between the firarm(s) usage and a violent crime or drug trafficking crime.

The basic facts to the firearm charge is that a co-defendant (Bowers) was in the possession of a firarm, but this fact does not meet the elements as set forth in the statute to convict the Petitioner of a violation of §924(c). The actions of the Petitioner clearly indicate that he was never in possession of a firearm, did not use a firearm, and did not carry a firearm in the offense that he has been charged with. During any of the transactions between the Petitioner and other(s) no drugs were present or no discussion of trafficking drugs occurred between the Petitioner and Fluker, Wilcox, campbell, or Bowens when a firearm was used or carried by the Petitioner.

First, mere possession by a coconspirator does not constitute use "in relation to a drug trafficking crime." **Smith vs. United States**, 113 S. Ct. 2050, 1059 (1993). [2/] Second, the firearm msut facilitate or potentially facilitate the drug trafficking offense. Id.

[2/] See also, **United States vs. Clemis**, 11 F. 3d 597 (6th Cir. 1993), cert denied 114 S. Ct. 1858 (1994); **United States vs. Feliz Cordero**, 859 F. 2d 250 (2nd Cir. 1988); **United States vs. Pace**, 10 F. 3d 1106 (5th Cir. 1993), cert denied.

II. BAILEY VS. UNITED STATES AND ITS PROGENY: THE EFFECTS OF

In United States vs. Bailey, 516 U.S. 137 (11th Cir. 1995), the Supreme Court considered the issue of whether evidence of the proximity and accessibility of a firearm to drugs or drugs proceeds along is sufficient to support a conviction for "use" of a firearm during and in relation to a drug trafficking offense under 18 U.S.C. §924(c). The Supreme Court held that it did not, and also rejected the notion that mere possession of a firearm by a person who commits the offense was sufficient to satisfy §924(c)(1). Id at 139, 143-44. Instead, the Court held, §924(c)(1) "requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." (Emphasis added.) Id at 139.

The Supreme Court explained that:

> The phrase "uses to commit" [in the original version of §924(c)] indicates taht Congress originally intended to reach the situation where the firearm was actively employed during the commission of the crime. This original language would not have stretched so far as to cover a firearm that played no detectable role in the crime's commission. For example, a defendant who stored a gun in a nearby closet for retrieval in case the deal went sour would not have "use[d] a firearm to commit" a crime. This version also shows that "use" and "carry" were employed with distinctly different meanings.
>
> ....of course, in Smith[3/] we recognized that Congress' subsequent amendments of §924(c) employed "use" expansively to cover both use as a weapon and use as an item of barter. See Smith, supra, at ____, 113 S. Ct. at 2057-58. But there is no evidence that Congress intended to expand the meaning of "use" so far as to swallow up any significance for "carry". If Congress had intended to deprive "use" of its active connotations, it could have simply substituted a more appropriate term ----"possession" ---- to cover the conduct it wished to reach.

3/ Smith vs. United States, 508 U.S. 223 (1993).

516 U.S. at 147-48. (Emphasis added). Thus, the Supreme Court stated, "active employment" would include "brandishing, displaying, bartering, striking with, and most obviously firing or attempting to fire, a firearm." Id at 148. It also recognized that an offender's reference to a firearm "calculated to bring about a change in the circumstances of the predicate offense" also could satisfy §924(c)(1), "just as the silent but obvious and forceful presence of a gun on a table." Id.

Since **Bailey**, this Court and other federal courts have addressed whether various conduct constitute the type of "active employment" discussed in **Bailey** to satisfy the "use" prong of §924(c)(1).

With respect to the "display" component, it has been held to be satisfied where the firearm was displayed to intimidate or to facilitate the defendant's activity. For example, in **United States vs. Wiseman**, 1999 WL *18 (10th Cir. April5, 1999), the Tenth Circuit Court rejected the defendant's argument that the evidence was insufficient to show that his co-defendant had actually "used" a weapon in connection with two robberies as the term is defined in **Bailey**. During one robbery, one of the robbers opened his jacket to show that he was carrying a gun, and said, "This is a real gun, this is a real robbery." In another robbery, an assistant store manager was approached by a man with a gun who ordered him to open a safe, and when the manager looked around while the robbery was going on, a second man opened his coat to show that he was holding a gun. In rejecting the defendant's contention that there was insufficient evidence because the witness did not testify that co-defendant did anything with thegun, the

Tenth Circuit held that "it is sufficient that Martin displayed the weapon, which he did with the obvious intent of intimidating the store employees and facilitating the robbery." Id at 190443, *18.

In **United States vs. Gipp**, 147 F. 3d 680 (8th Cir. 1998), the evidence also was found to be sufficient to support the defendant's conviction under the "use" prong of §924(c) with respect to a drugs-for-stero transaction, where sometime after the transaction, while in his vehicle, the defendant leaned down and grabbed the butt of a handgun while threatening retalition against his customers and distributors after it was denied that they had "ratted" on him about the transaction. The Eighth Circuit Court held that the defendant "actively employed" the firearm "during and in relation" to a drug trafficking crime because he displayed the handgun in order to protect his drug trafficking activity.

However, the evidence was insufficient in **United States vs. Hall**, 110 F. 3d 1155, 1160-61 (5th Cir. 1997), to establish that the defendant either "disclosed, displayed, mentioned or actively employed the firearm in any way," where the defendant was in the same room as the firearm when the officers entered the room and the weapon was on the floor a few feet from the table upon which the drugs and paraphernalia were sitting. The factual basis for the defendant's Hall's guilty plea to using and carrying a firearm in relation to a drug trafficking crime indicated that when the officers entered the mobile home they found the four defendants and approximately 323.4 grams of cocaine base, most of which was on a coffee table in the living room and on the floor

beside the coffee table. Defendant Hall, who had cocaine powder on his hands, and another defendant were in the living room, and the two other defendants were in different bedrooms. The officers found two firearms, one within a few feet of the coffee table where most of the cocaine base was located, and another laying in a bed in a bedroom near a quantity of cocaine on the floor. The Fifth Circuit Court held that those facts failed to establish a factual basis for the defendant's plea under the "use" prong of §924(c)(1) because they failed to show that the defendant "actively employed the firearm, or that the firearm was an operative factor, during and in relation to Hall's predicate drug crime." Id at 1160.

The evidence was also found to be insufficient in **United States vs. Carter**, 117 F. 3d 262, 264-65 (5th Cir. 1997), to satisfy the "use" prong where during the drug trafficking, the firearm was on top of the car's console to which both the defendant and his co-defendant had access. See also **United States vs. McPhil**, 112 F. 3d 197 (5th Cir. 1997) (in light of **Bailey**, evidence was insufficient to support defendant's conviction for using or carrying a firearm in relation to a drug trafficking crime where evidence showed that the government retrieved eight weapons from the defendant's home in close proximity to a large quantity of marijuana and one gun from the defendant's car).

B. APPLICATION OF BAILEY TO THIS CASE:

Applying **Bailey** and the cases that follow it, the evidence presented at trial in this case is insufficient to support a conviction

for "use" by "active employment" of a firearm during and in relation to a drug trafficking offense or a crime of violence.

First, no evidence was presented during the proffer of evidence to the jury that the Petitioner fired or attempted to fire the firearm, nor that he struck anyone with any of the guns alleged in the possession of his co-defendnat. So there is no record of "active employment" by those means.

Second, no evidence was presented during the proffer of evidence that any of the firearm alleged in the indictment were used as an item of barter during the drug trafficking offense. So there also is no record evidence of "active employment" by that method.

Third, the trial testimony, and the agents written reports of the alleged offense does not reflect that there is any record of "active employment" by any reference to a firearm "calculated to bring about a change in the circumstances, as the offense relates to the actions of the Petitioner.

Fourth, there is no evidence to support "active employment" by brandishing because the trial testimony and agents reports do not support that the weapon in the indictment was brandished by the Petitioner.

Finally, in light of the cases discussed above regarding "active employment" by displaying a firearm, the record evidence viewed in the light most favorable to the government shows, that the Petitioner never was in possession of a firearm, never used a firearm and never carried a firearm during this drug trafficking offense.

But **Bailey** and the cases discussed above make clear that the government's theory of what was necessary to satisfy the "use" prong is no longer valid. The firearm in this case was in the possession of co-defendant Bowens, was never in the possession of the petitioner, was never used by the Petitioner, and was never carried by the Petitioner. There had to be a reason and an ability to use that gun in the event of any emergency or any contingency." Id.

In **Gipp**, the defendnat leaned down, grabbed the butt of a handgun, and made threats against his customers and distributors. In this case, the undisputed testimony of the agents indicated that the Petitioner did not possess a firearm, and that the only firearm that is described in count three was in the possession of co-defendnat Bowens. The actions of the Petitioner is analogous to the **Carter**, supra case in that the evidence was insufficient to satisfy either the "use" or the "carry" prong in relation to a drug trafficking offense. From the Agent's investigation report, and the trial testimony, it is clear that the firearm was in the possession of the Petitioner's co-defendant, and that he is actually innocent of the charges in count three of the indictment.

Because **Bailey** discussed only the "use" prong of §924(c), it did not change the analysis to be applied to determine whether evidence is sufficient to convict a defendant for "carrying" a firarm under §924(c). See **United States vs. Farris**, 77 F. 3d 391, 395, n.4 (11th Cir.) cert denied, ____U.S. _____, 117 S. Ct. 241, 136 L. Ed. 2d 170 (1996). In order to convict a defendant for "carrying" a firearm, it is necessary only to show that the defendant knowingly carried a gun in a car that was being used as drug-

distribution center. **United States vs. Range**, 94 F. 3d 614, 617 (11th Cir. 1996); see also **Muscarello vs. United States**, ____U.S. ____, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998).

In the instant pleading, the Petitioner argues that the evidence was insufficient to support a violation of §924(c) and that he is acually innocent of the offense. **Bousley vs. United States**, supra.

The United States Supreme Court in defining the maning of the phrase during and in relation to, effectively created a yardstick of culpability by which the courts have upheld the finding that a gun was possessed during and in relation to a drug offense where a nexus is established between the firearm and the predicate offense. **Smith vs. United States**, 508 U.S. 223, 238 (1993). The gun must facilitate or have the potential of facilitating the drug offense. Id. (quoting **United States vs. Stewart**, 779 F. 2d 538, 540 (9th Cir. 1985). This requirement results from the court's holding that the coincidental or accidental placement of a firearm near cash or drugs is not punishable under 924(c). **Smith**, supra at 238. See **U.S. vs. Warwick**, 167 F. 3d 965 (6th Cir. 1999); **United States vs. Brown**, 915 F. 2d 219, 224 (6th Cir. 1990).

The Court must examine the totality of the circumstances in determining whether a firearm was used or carried in relation to a drug trafficking crime. The Petitioner must have intended to have the firearm available for use during or immediately following the drug transaction, or possession of the firearm must have facilitated the crime by emboldening the defendant. In this case,

as discussed above, the evidence was insufficient to show active employment by any of the means discussed in **Bailey**, and therefore the "use" is not satisfied. The evidence is insufficient to support that the Petitioner "carried" a firearm "during and in relation to a drug trafficking crime.

ISSUE THREE

WHETHER THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURTS INSTRUCTIONS TO THE JURY REMOVED THE ELEMENTS OF USE, CARRY AND DURING OR IN RELATION TO A DRUG TRAFFICKING OFFENSE AS A VIOLATION OF 18 U.S.C. §924(c) FOR CONSIDERATION CONTRARY TO **BAILEY**, AND **U.S. VS. GAUDIN**?

In instructing the jury the court charged that the evidence need not prove the elements of "use", "carry" or during or in relation to a drug trafficking offense. The Court expressely instructed the jury with the term possession. The terms defined by the Supreme Court in **Bailey**, require proof of these elements beyond a reasonable doubt.

In **U.S. vs. Gaudin**, 515 U.S. 522-23 (1995) (citations omitted) the Supreme Court reversed the defendant's conviction, concluding that the lower court's failure to submit the issue of materiality to the jury had deprived the defendant of the right to demand that the jury find him guilty of every element of the crime charged. Id at 511. Moreover the Supreme Court in **Bailey**, supra pointed out that active employment must be meet for the "use" element of the §924(c) statute to be activated. This element is a Sixth Amendment right to trial by jury entilted a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. Quoting **In re Winship**, 397 U.S. 358, 364. The historical foundation for these principles extends down centuries into the common law. While judges in this country have long exercised discretion in sentencing, such discretion is bound by the range of sentencing options prescribed by the

legislature. The historic inseparability of verdict and judgment and the constant limitation of judge's discretion highlight the novelty of a scheme that removes the jury from the determination of a fact that exposes the defendant to penalty exceeding the maximum that he could have received if the jury had all the elements of a stuatute to consider in deciding the guilty of the alleged offense.

Based upon the new reasoning of **Bailey**, the jury did not consider the active emplyment of the firearm in relation to the actions of the Petitioner based on the instuctions that he Court gave in this case. The Court's charge to the jury absent the new reasoning of **Bailey**, is a Sixth Amendment violation right to have the jury determine every essential element and fact which constituted the crimes charged in count three of the indictment.

Wherefore, the Petitioner prays that that this Court will adopt the reasoning of Bailey and determine that the jury instructions in the case at bar was deficient and is deserving to be considered at an evidentiary hearing.

ISSUE FOUR

TITLE 28 U.S.C. §2241 IS THE PROPER REMEDY TO ENTERTAINED THE DUE PROCESS VIOLATION IN COUNT THREE OF THIS CASE.

A §2241 petition which attacks custody resulting from a federally imposed sentence may be entertained when the Petitioner establishes that the remedy provided for under §2255 is inadequate or ineffective to test the legality of his detention. **Tolliver**, 211 F. 3d 877 (5th Cir.). **Tolliver** serves tht the "Savings Clause" the fifth paragraph of §2255 provides that:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 US..C. §2255.

The Circuit decisions support the Petitoiner's contention that this §2241 writ is appropriate for the relief requested. See **Triestman**, 124 F. 3d at 365; **Dorsainvil**, 119 S. 3d at 246-48. In these cases the prisoners were able to obtain review of their claims pursuant to §2255 motion because **Bailey** had been decided after they had filed their first 2255 motions, and they were unable to meet the requirements for filing a succeswsive §2255 motion. See **Davenport**, 147 F. 3d at 607-08. **Triestman**, 124 F. 3d at 365-66; **Dorsainvil**, 119 F. 3d at 246-48.

The Petitioner concedes that the courts have narrowly recognized that the §2241 is the proper remedy for relief on newly

recognized authorities. The Petitioner requests this Court to conclude and adopt the decision of the Fifth Circuit in **Jeffers vs. Chandler**, 234 F. 3d 277 (5th Cir. 2000) and find that the Title 28 U.S.C. §2241 motion is the proper remedy to seek the relief requested pursuant to the Bailey decision. The Court in **Jeffers** concluded that the District Court should consider the merits of the jury charge claim. This decision is analogous since the Petitioner seeks relief on a similar question based on the Bailey decision.

The Eleventh Circuit in **Wofford vs. Scott**, 177 F. 3d 1236, 1244 & N.3 (11th Cir. 1999) held that Petitioner's claims should be based on a retroactively applicable Supreme Court decision which overrules circuit law that was existing at the time the claim whould have otherwise been raised. This reasoning plus the reasoning of the **Triestman**, 124 F. 3d at 377-80 regarding a serous constitutional question supports the Petitioner's claim that the §2241 motion is the proper remedy for relief in this case.

CONCLUSION

In light of **Bailey** and its progeny, the evidence presented at trial was insufficient to show that the defendant "used" (by active employment) a firearm during and in relation to a drug trafficking offense under 18 U.S.C. §924(c). Thus, defendant's conviction as to Count Three must be reversed, and the sixty month consecutive sentence to count one and two be vacated by this Court.

Respectfully Submitted,

Samuel Hall, Pro Se
Unit F-1, #42217-004
2680 Hwy. 301 South
Federal Correctional Institution
Jesup, Georgia 31599

CERTIFICATE OF SERVICE

I, Samuel Hall hereby certify that a true and correct copy of the forgoing 2241 motion with Memorandum of law has been deposited in the U.S. Mail with adequate postage on this 2nd day of April, 2001 to the following:

- Assist. U.S. Attorney
  United States Attorney's Office
  99 N.E. Fourth Street
  Miami, Florida 33132

_____
Samuel Hall, Pro Se

Supreme Court, U.S.
FILED
SEP 30 2002
CLERK

No. 01-10996

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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SEP 30 2002
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SUPREME COURT, U.S.

QUESTION PRESENTED

1. Whether petitioner's petition for a writ of habeas corpus under 28 U.S.C. 2241 was correctly treated as a motion under 28 U.S.C. 2255.

2. Whether the court of appeals correctly denied petitioner a certificate of appealability under 28 U.S.C. 2255.

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-10996

SAMUEL HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals' order denying petitioner's request for a certificate of appealability (Pet. App. 1) is unpublished.

JURISDICTION

The court of appeals' order denying petitioner's motion for reconsideration of its order denying a certificate of appealability was entered on March 20, 2002. The petition for a writ of certiorari was filed on June 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioner was convicted in the United States District Court for the Southern District of Florida of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C.

846 (Count 1); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a) (Count 2); and aiding and abetting the use and carrying of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 18 U.S.C. 2 (Count 3). He was sentenced to concurrent 210-month terms of imprisonment on Counts 1 and 2, and to a consecutive 60-month term of imprisonment on Count 3, to be followed by five years' supervised release. Petitioner voluntarily dismissed his direct appeal, and was later resentenced under Fed. R. Crim. P. 35(b) to concurrent 140-month terms of imprisonment on Counts 1 and 2.

Petitioner filed three separate motions under 28 U.S.C. 2255, each of which was either denied or dismissed. Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Southern District of Georgia. The court transferred that motion to the Southern District of Florida, where it was dismissed as an unauthorized successive Section 2255 motion. Petitioner sought a certificate of appealability to appeal that ruling, which was denied, as was his motion for reconsideration.

1. In August and September 1990, petitioner's co-defendant Willie Fluker negotiated to purchase a large quantity of cocaine from John Fernandez, a confidential informant working for the FBI in an ongoing law enforcement investigation into cocaine trafficking in South Florida. As part of his arrangement with Fernandez, Fluker agreed to pay $100,000 at delivery, with the balance to be paid later. Gov't C.A. Br. (No. 91-6111) 5-8.

On September 14, 1990, Fluker allowed a person known to him as

Fernandez's associate to drive Fluker's truck to an unspecified location where it would be loaded with 35 kilograms of cocaine. Unbeknownst to Fluker, the associate was an undercover FBI agent who drove Fluker's truck to the FBI's Miami office and loaded it with cocaine as part of a controlled buy. When the agent returned in the truck after it had been loaded with the drugs, Fluker tested some of the cocaine and deemed it acceptable. Fluker then told Fernandez that his "money man" was around the corner. A few minutes later, petitioner arrived carrying two bags containing money and jewelry. After learning that Fluker had brought only $47,000 in cash, Fernandez called the deal off. Fluker then told Fernandez he would get more money, and he and petitioner then left. Gov't C.A. Br. (No. 91-6111) 8-10.

Later that day, co-defendant Brian Wilcox, a cocaine distributor, received a telephone call from his brother stating that Fluker was looking for someone to invest $30,000 towards the purchase of a load of cocaine. Wilcox said that he did not have money, but he agreed to contact co-defendant Johnnie Bowens on Fluker's behalf. Bowens, in turn, told Wilcox that he would provide the funds that Fluker was seeking in exchange for two kilograms of cocaine and Fluker's agreement to supply him with additional cocaine at a reduced price. On September 17, 1990, Wilcox called Fluker and stated that he had located an "investor." Gov't C.A. Br. (No. 91-6111) 10-11.

The following day, petitioner arrived at Fluker's residence with a bag. Petitioner left the residence without the bag, at which time Fluker and Wilcox departed the residence together. Fluker then contacted Fernandez and told him he had $40,000 in cash and jewelry,

and that they would deliver another $30,000 once he received the cocaine. Gov't C.A. Br. (No. 91-6111) 11-12. They then agreed to conclude the deal. Shortly thereafter, two undercover agents delivered 28 kilograms of cocaine to a pre-arranged location, where Fluker had driven with Wilcox and Bowens in Fluker's Jaguar. Other FBI agents were conducting surveillance. Fluker and Wilcox went inside while Bowens remained in the car. Id. at 12-14. While inside, Fluker tested the cocaine and, after expressing satisfaction with it, told Wilcox to get the rest of the money. Wilcox went to the car and retrieved a bag full of money that Bowens was holding. After removing the bag, Wilcox observed, for the first time, a black gun on Bowens's lap. Id. at 13-14. Wilcox returned inside and gave the bag to Fluker who, in turn, gave it to Fernandez. In the meantime, Fluker removed two packages of cocaine from the truck and gave them to Wilcox, who placed them under his shirt and trousers and left the building in order to deliver the drugs to Bowens. As Wilcox opened the passenger side door of the Jaguar where Bowens was seated, Wilcox noticed that law enforcement officers were approaching. Id. at 14.

Bowens jumped out of the Jaguar and starting running away. During the pursuit, Bowens turned and observed an agent following him, at which time Bowens reached into his waistband and dropped a firearm and a set of keys to the ground; Bowens hesitated, looked back at the agent, and then continued running. Gov't C.A. Br. (No. 91-6111) 14-16. Bowens managed to escape, but petitioner and Fluker were arrested later that evening. Wilcox was also arrested shortly thereafter, and he later made a statement that Bowens had been in possession of a gun

during the drug deal. PSR ¶ 19.

2. On April 26, 1991, a federal grand jury in the Southern District of Florida returned a second superseding indictment charging petitioner and his co-defendants with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 1); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a) (Count 2); and "knowingly us[ing] and carry[ing] a firearm" during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1994) (Count 3).

At trial, the district court instructed the jury, with respect to Count 3, that "the Government need not prove that the firearm was fired, brandished, or displayed during the drug trafficking offense. Possession of a firearm constitutes use in relation to a drug offense if the possession is an integral part of, and facilitates the commission of, the offense." Sept. 30, 1991 Jury Instruction 12. The court also instructed the jury that a defendant "may be found guilty of a substantive count even though he did not directly participate in the acts constituting the offense as defined in the substantive count" if the acts were "reasonably foreseeable consequences of the conspiracy." Id. Instruction 13; see Pinkerton v. United States, 328 U.S. 640 (1946).

The jury found petitioner guilty on Counts 1-3, and he was later sentenced to concurrent 210-month terms of imprisonment on Counts 1 and 2, and to a consecutive 60-month term of imprisonment on Count 3. Petitioner is currently serving those sentences in the Federal Correctional Institution in Jesup, Georgia.

3. On December 16, 1991, petitioner filed a notice of appeal. While that appeal was pending, petitioner agreed to cooperate with law enforcement authorities in an ongoing drug investigation. As a result of that cooperation, petitioner voluntarily dismissed his appeal. Order (10/28/92). On January 27, 1993, the district court granted the government's motion, made pursuant to Fed. R. Crim. P. 35, to reduce petitioner's sentences on Counts 1 and 2, because of his substantial assistance, from 210 months' to 140 months' imprisonment. Order (1/27/93), No. 90-CR-732 at 1-2.

4. On September 1, 1994, petitioner filed his first motion under 28 U.S.C. 2255 in the Southern District of Florida. That motion alleged that petitioner's trial counsel had been ineffective for failing to file three separate pre-trial motions, for not allowing petitioner to testify on his own behalf at trial, and for failing to argue that the quantity of cocaine attributed to him at sentencing was not reasonably foreseeable. See No. 94-CV-1811 (S.D. Fla.). On May 31, 1995, after an evidentiary hearing, the district court denied the motion on the merits. Order (5/31/95) at 1-8. Petitioner appealed that decision.

On June 17, 1996, during the pendency of petitioner's appeal from the denial of his initial Section 2255 motion, petitioner filed a second motion under 28 U.S.C. 2255. See No. 96-CV-1676 (S.D. Fla.). In that motion, petitioner asserted, for the first time, that his conviction on Count 3 should be vacated in light of this Court's intervening decision in Bailey v. United States, 516 U.S. 137 (1995). Bailey held that "use * * * of a firearm," within the meaning of the

version of 18 U.S.C. 924(c) then in effect, required proof that the firearm in question was actively employed, rather than passively possessed. Id. at 144-145. The district court dismissed petitioner's motion for lack of jurisdiction because of the pendency of petitioner's appeal of his first motion and because petitioner had not sought or obtained authorization from the court of appeals to file a successive Section 2255 motion, as was required by the then-newly enacted provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). See 28 U.S.C. 2255 ¶ 8; 28 U.S.C. 2244(b)(3)(A).[1]

On March 31, 1997, the court of appeals affirmed the denial of petitioner's initial Section 2255 motion (No. 94-CV-1811). See United States v. Hall, 111 F.3d 895 (Table). On June 10, 1997, petitioner filed his third motion under 28 U.S.C. 2255, in which he renewed his Bailey challenge to his conviction on Count 3. See No. 97-CV-1798 (S.D. Fla.) The district court dismissed that motion on the ground that it was a successive motion and that petitioner had failed to obtain the appellate authorization required by AEDPA before it could be filed. In response, petitioner applied directly to the court of appeals for authorization to file a successive Section 2255 motion. That request was denied on January 30, 1998, because, as the court of appeals had previously concluded, Bailey "did not express a new rule of constitutional law; rather, it merely interpreted a substantive criminal statute using rules of statutory construction." In re

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[1] A court of appeals may authorize the filing of a second or successive Section 2255 motion only where it relies on newly discovered evidence of actual innocence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255 ¶ 8(2).

Blackshire, 98 F.3d 1293, 1293 (11th Cir. 1996) (per curiam).

5. On May 2, 2001, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Southern District of Georgia, the district in which petitioner was imprisoned, again seeking to challenge his conviction on Count 3 in light of Bailey. See No. 01-CV-78 (S.D. Ga.). Petitioner alleged that Section 2255 was an "inadequate or ineffective" remedy because it precluded him from asserting a claim of actual innocence on the basis of an intervening change in the law. On May 4, 2001, the district court issued an order stating that, because the petition "attacks a judgment of conviction obtained in the United States District Court for the Southern District of Florida," it was appropriate to transfer the action to that court for further proceedings.[2]

6. After the Southern District of Florida docketed the case (No. 01-CV-1877), it was referred to a magistrate judge who issued a report and recommendation stating that the motion was "in legal effect a successive motion to vacate pursuant to 28 U.S.C. 2255," and recommending that it be dismissed because petitioner had not obtained authorization from the court of appeals to file it. Pet. App. 23. Petitioner objected to the Magistrate Judge's Report, contending that his petition had properly been filed under Section 2241 because Section 2255 was an inadequate or ineffective remedy, on the ground that a

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[2] Petitioner did not attempt to appeal the Southern District of Georgia's transfer order. Such an attempt would have been futile, however, since the court of appeals had previously determined that such orders -- whether made pursuant to 28 U.S.C. 1406 or 28 U.S.C. 1631 -- are not final, appealable rulings. See Middlebrooks v. Smith, 735 F.2d 431, 432-433 (11th Cir. 1984); see also Brinar v. Williamson, 245 F.3d 515, 517-518 (5th Cir. 2001) (following Middlebrooks).

claim under Bailey could never be the basis for a successive motion. Pet. App. 12-16. The district court overruled the object ion and dismissed the motion. Pet. App. 20. Petitioner moved for reconsideration, pointing out that he had already attempted, unsuccessfully, to obtain such authorization. The district court denied that motion as well, and also denied petitioner's request for a certificate of appealability (COA) under 28 U.S.C. 2253(c)(2). Pet. App. 17-18.

7. On January 16, 2002, a circuit judge denied petitioner's request for a COA on the ground that petitioner had already filed three prior Section 2255 motions and that he had not obtained appellate authorization to file the present successive motion. Pet. App. 5. In response, petitioner filed a "Motion to Request a Three Judge Panel to Review Motion for Certificate of Appealability and Petition for Suggestion of Rehearing En Banc." Pet. App. 6-10. Construing that pleading as a motion for reconsideration of the order denying a COA, a three-judge panel, by order dated March 20, 2002, denied reconsideration on the ground that petitioner "failed to make the requisite showing" under Slack v. McDaniel, 529 U.S. 473 (2000), to warrant the issuance of a COA. Pet. App. 2.

ARGUMENT

1. Petitioner's central contention (Pet. 2-12) is that he is "actually innocent" of the Section 924(c) offense (Count 3) because the evidence fails to demonstrate that Bowens "actively employed" the firearm, as is required after Bailey to prove "use." Petitioner argues that Section 2255 is an "inadequate or ineffective" remedy because, as

amended by AEDPA, that provision precludes a court of appeals from authorizing an "actually innocent" prisoner in his position to file a successive Section 2255 motion. Therefore, he contends, he should have been permitted to seek relief under Section 2241. The courts below, however, correctly treated petitioner's filing as a motion under 28 U.S.C. 2255.

a. Under 28 U.S.C. 2241, federal courts may issue writs of habeas corpus to federal or state prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States." See Felker v. Turpin, 518 U.S. 651, 659-660 & nn.1-2 (1996); United States v. Hayman, 342 U.S. 205, 211-212 & nn.10-11 (1952). A habeas corpus petition must be filed in the district with jurisdiction over the defendant's custodian, which is typically the jurisdiction where the defendant is imprisoned (here, the Southern District of Georgia). See Hayman, 342 U.S. at 213; Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 494-495 (1973). Until 1948, writs of habeas corpus were used by federal prisoners as a means of challenging the constitutionality of judgments of conviction. But because federal prisoners may be incarcerated far from the districts in which they were convicted and sentenced, habeas corpus petitions filed by federal inmates often created serious administrative difficulties. See Hayman, 342 U.S. at 213-14 & n.18.

In 1948, Congress responded to those administrative concerns by enacting 28 U.S.C. 2255. Section 2255 allows federal prisoners to obtain collateral review of their convictions by filing a "motion" -- rather than a habeas "petition" -- in the district where they were

convicted and sentenced (here, the Southern District of Florida), rather than the district of confinement. Hayman, 342 U.S. at 219; see also Reed v. Farley, 512 U.S. 339, 353 (1994). Section 2255 thus replaces the habeas corpus remedy in most cases, providing that:

> [a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by way of motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. 2255 (emphasis added). Accordingly, a habeas corpus action filed by a federal prisoner challenging the legality of his conviction will be cognizable only if the prisoner can first establish that Section 2255 is "inadequate or ineffective."

Section 2255 is not rendered "inadequate or ineffective" simply because relief has already been denied under that provision, because a prisoner is procedurally barred from pursuing Section 2255 relief, or because a prisoner has been denied permission to file a second or successive motion under Section 2255. See Charles v. Chandler, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam) (collecting cases). As numerous courts have noted, such a result would "nullify" the limitations Congress has placed on collateral review. See, e.g., In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998); United States v. Barrett, 178 F.3d 34, 52-53 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000).

At the same time, the courts of appeals that have considered the issue have concluded that a prisoner may resort to Section 2241 in the narrow circumstance in which the AEDPA's limits on successive motions

under Section 2255 would otherwise deny the prisoner a forum for asserting a claim of actual innocence of "using" a firearm under the narrowed interpretation of "use" that was first embraced in Bailey v. United States, 516 U.S. 137, 150 (1995). See In re: Jones, 226 F.3d 328, 333-334 (4th Cir. 2000); Wofford v. Scott, 177 F.3d 1236, 1244 (11th Cir. 1999); In re Davenport, 147 F.3d at 611-612; Triestman v. United States, 124 F.3d 361, 376-377 (2d Cir. 1997); In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997); see also Barrett, 178 F.3d at 52-53 ("We agree with the Davenport, Dorsainvil, and Triestman courts that habeas corpus relief under 2241 remains available for federal prisoners in limited circumstances"); cf. In re: Hanserd, 123 F.3d 922, 930 (6th Cir. 1997) (prisoner who is barred by gatekeeping requirements from challenging Section 924(c) conviction in motion under Section 2255 may raise Bailey claim under Section 2241). The courts have recognized that narrow exception to the exclusivity of Section 2255 to make available a judicial forum to review claims of factual innocence when that claim was not available when the initial Section 2255 motion was filed. Jones, 226 F.3d at 333 n.3; see Triestman, 124 F.3d at 379-380; In re Dorsainvil, 119 F.3d at 250. In those circumstances, the defendant stands convicted of "using" a firearm based on the act of merely possessing the weapon -- conduct that, after Bailey and before the more recent amendments to Section 924(c), see 18 U.S.C. 924(c)(2000) -- was not a violation of the criminal law. See Bousley v. United States, 523 U.S. 614, 620 (1998) (explaining that, because Bailey cut back on the reach of a federal criminal statute, the decision created "a significant risk that a defendant stands convicted

of an act that the law does not make criminal"). Those courts have concluded that allowing a person so situated to seek relief under Section 2241 avoids any potential constitutional question that might otherwise arise if no such forum were available. See Davenport, 147 F.3d at 609; Triestman, 124 F.3d at 377; Dorsainvil, 119 F.3d at 249-251.

b. Petitioner contends that he is actually innocent because the evidence shows that Bowens possessed, but did not actively employ, the firearm, and thus did not "use" the weapon. In this context, however, "'actual innocence' means factual innocence, not mere legal insufficiency." Bousley, 523 U.S. at 623. It is debatable whether the evidence that Bowens took the gun with him as he exited the vehicle in the course of fleeing from law enforcement officers constitutes the kind of active employment ("use") of a firearm required by Bailey. But whether or not Bowens (and therefore petitioner) are factually innocent under the "use" theory of liability under Section 924(c), they are not actually innocent of the Section 924(c) offense in light of the uncontroverted evidence that Bowens's conduct amounted to "carrying" within the meaning of Section 924(c).

Bailey recognized that a defendant could be convicted on a "carrying" theory of liability under Section 924(c) even if the evidence would not support a conviction based on the "use" theory. 516 U.S. at 150. In Muscarello v. United States, 524 U.S. 125, 131 (1998), this Court held that "carry[ing]" under Section 924(c) includes the physical transportation of a weapon on one's person. There is no dispute that Bowens therefore "carr[ied]" a firearm in this case. See

Tannenbaum v. United States, 148 F.3d 1262, 1264 (11th Cir. 1998) (per curiam) (carrying a loaded weapon in one's waistband is "carrying" within the meaning of Section 924(c)). And Bailey did not alter the applicability of Pinkerton liability under Section 924(c). See United States v. Bell, 137 F.3d 1274, 1275 (11th Cir. 1998) (per curiam).

That the district court did not instruct the jury on the "carrying" theory does not change this conclusion. In convicting petitioner (vicariously, under Pinkerton) for Bowens's "use" of the weapon, the jury necessarily credited the testimony, from cooperating co-conspirator Wilcox as well as Agent Fassanella, that Bowens had a weapon in the car and that he reached into his waistband to grab the gun and drop it while fleeing the agent. Thus, the jury's finding of guilt under a pre-Bailey "use" instruction nevertheless necessarily establishes that the jury found all of the facts required to support the conclusion that Bowens "carried" the weapon. In other words, the jury's finding of passive "use" in this case necessarily encompasses a finding of carrying as well. See Neder v. United States, 527 U.S. 1, 8-9 (1999). And that finding means that petitioner is not, on this record, factually innocent of the Section 924(c) offense.

The district court's failure to instruct the jury on the "carrying" theory would not have entitled petitioner to relief on direct review, given the necessary finding of carrying implicit in the jury's verdict. See United States v. Brown, 161 F.3d 256, 258-259 & n.4 (5th Cir. 1998) (en banc) (collecting cases so holding). In light of the more stringent standards for relief that apply on collateral review, petitioner can fare no better here. See Castillo v. United

States, 200 F.3d 735, 737 (11th Cir.), cert. denied 531 U.S. 845 (2000). Because petitioner cannot make out his claim of actual innocence, he would not be entitled to file a Section 2241 motion by those courts that recognize that theory, and the courts below in this case correctly treated his filing as a motion under Section 2255 instead.

2. The court of appeals correctly denied petitioner a certificate of appealability. Petitioner filed his first Section 2255 motion on September 1, 1994. It was denied on its merits by the district court on May 31, 1995, and that decision was affirmed on March 31, 1997. Accordingly, this was a second or successive motion. Under 28 U.S.C. 2255 ¶ 8, a second or successive motion "must be certified as provided in [28 U.S.C. 2244] by a panel of the appropriate court of appeals" before it may be filed. Petitioner did not obtain such certification before filing his motion. The district court accordingly correctly dismissed it. Because that conclusion is not subject to reasonable debate, and because it should be resolved by the court of appeals as gatekeeper of second and successive Section 2255 motions rather than on appeal from a district court's ruling, the court of appeals correctly denied petitioner a certificate of appealability. See Slack v. McDaniel, 529 U.S. 473, 478 (2000) (certificate of appealability from district court dismissal on procedural grounds may issue only if "jurists of reason would find it debatable whether the district court was correct in its procedural ruling").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

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